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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

LEONARDO GUTIERREZ,

Defendant and Appellant.

E033270

(Super.Ct.No. FWV024633)

OPINION

APPEAL from the Superior Court of San Bernardino County. Shahla S. Sabet,
Judge. Affirmed.

John L. Dodd, under appointment by the Court of Appeal, for Defendant and
Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney
General, Gary W. Schons, Senior Assistant Attorney General, and Rhonda L. Cartwright-
Ladendorf, Supervising Deputy Attorney General, for Plaintiff and Respondent.

A jury found defendant guilty of second degree murder (Pen. Code, § 187, subd. (a)),¹ unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a)), making criminal threats (§ 422), and threatening a witness (§ 140, subd. (a)); it found him not guilty of torture (§ 206). The jury also found true that defendant used a deadly and dangerous weapon (§ 12022, subd. (b)(1)), to wit, a glass ashtray, during the commission of the murder. As a result, defendant was sentenced to a total term of 21 years 4 months to life in state prison. Defendant's sole contention on appeal is that the trial court erred in refusing to instruct the jury with the voluntary manslaughter instruction. We reject this contention and affirm the judgment.

I

FACTUAL BACKGROUND

On February 1, 2002, Maria Figueroa reported to the Ontario Police Department that her white 1996 GMC Jimmy had been stolen by her 19-year-old live-in stepson. By the time Officer Federico Alvarez arrived at Figueroa's apartment about 3:35 a.m., defendant had returned the vehicle and was asleep in the living room. Figueroa asked Officer Alvarez to explain to defendant that he did not have permission to take the vehicle and that if he took it again she was going to have him prosecuted for stealing the vehicle. She also asked the officer to tell defendant she was tired of the problems that had been going on with the chores and defendant taking the car, and if it did not stop she would evict defendant.

¹ All future statutory references are to the Penal Code unless otherwise stated.

On the evening of February 12, 2002, Alfred Corrales, Jr., went to his shop in Ontario. While there, about 10:45 p.m., Corrales heard somebody rattle the back door of his shop. Corrales then turned off the lights, set the alarm, and drove around to the back of the shop where he saw a trash can on fire. As he drove closer, he saw a body on fire and called 911. The burned body was that of Maria Figueroa.

Guadalupe Torres was defendant's ex-girlfriend; they were dating from January 2001 to around October 2001. Torres never met Figueroa, but she talked with defendant about his relationship with Figueroa. Torres testified that defendant and Figueroa did not get along. Figueroa was strict with defendant and had certain house rules: he had a 7:00 p.m. curfew; he was not allowed to touch anything unless Figueroa was there; and if he came home late, he would be locked out of the house. About a year before the murder, there was an incident where Figueroa yelled at defendant for taking a shower, being too loud, and sneaking into the house after 7:00 p.m. Even though Torres never heard Figueroa insult defendant, she testified that Figueroa would insult defendant whenever she could. She also insulted defendant's mother. Figueroa also did not approve of defendant's relationship with Torres because she did not think Torres was a good partner. Defendant blamed the lack of a relationship with his father on Figueroa and wanted to return to Mexico.

On February 12, 2002, at 8:20 p.m., defendant drove Figueroa's car to Torres's place of work. As defendant tried to persuade Torres to talk to him, he said under his breath that he had killed Figueroa. Torres noticed a scratch on defendant's nose and some blood on his shirt, and his pants were ripped from the seam of the ankle to the knee.

Defendant told Torres the body was in the bathroom and that he had a plan. Defendant wanted Torres to go with him, but Torres refused, and defendant left. Torres returned to work and told her friend, Maria Munoz, what had happened.

Later that evening around 11:45 p.m., Munoz and Torres drove by defendant's home. They saw the white GMC Jimmy parked in front, the kitchen light on, and defendant with his father, Samuel Gutierrez, who was married to Figueroa. On the basis that everything looked "normal" in the house, Torres concluded defendant was lying about killing Figueroa.

Defendant's father saw Figueroa when he left for work on February 12, 2002, at 1:10 p.m. When Gutierrez returned home at 11:30 p.m., Figueroa was not at home, but defendant was. Defendant handed Gutierrez the car keys and said Figueroa had left. Gutierrez did not notice anything unusual about defendant; defendant appeared normal and calm. When Gutierrez awoke the following morning, February 13, defendant and the white GMC Jimmy were gone. Gutierrez testified that defendant and Figueroa had problems, but they were "not that bad," and that Figueroa did not like defendant drinking.

On February 13, 2002, defendant called Torres around noon. In the first telephone call, defendant said he wanted to see Torres and had a lot to tell her. Torres refused and accused defendant of lying to her about killing his stepmother. Defendant responded that he would not lie to her about something like that. When Torres refused to see defendant, he became angry and hung up. Five minutes later defendant called back and insisted on seeing Torres. Torres again refused. Defendant replied if he could not see Torres, he

was going to kill her. He then hung up the telephone. A few minutes later, Torres saw defendant drive by her home in Figueroa's car. Torres called 911.

About 2:00 p.m. on February 13, 2002, Alfredo Corrales, Sr., saw defendant driving a white Blazer in front of his finishing shop. Defendant was drinking and told Corrales, Sr., he "beat the hell" out of his mother-in-law or stepmother. Later that day, about 4:30 p.m., defendant had dinner with Rosario Maldonado and her family. Maldonado said that defendant appeared calm and that she saw defendant driving a white Blazer.

About 8:45 p.m., Officer Brett Mickelson of the Glendora Police Department was on patrol looking for a white sport utility vehicle with the partial license plate number 4PCC, which was wanted for a homicide investigation being conducted by the Ontario Police Department. Officer Mickelson spotted the vehicle and called for back-up units. After two additional units arrived, Officer Mickelson initiated a traffic stop on the vehicle, which was being driven by defendant. Defendant pulled over, turned off the car, and put his hands out the window, but he refused to get out of the car. After ordering defendant to get out of the car four or five times, defendant restarted the car and drove off. A pursuit ensued. Defendant eventually stopped. Officer Mickelson again ordered defendant out of the vehicle, but defendant did not comply. Defendant ultimately was taken into custody.

On February 14, 2002, around 2:00 a.m., defendant called Torres from jail and wished her a Happy Valentine's Day. A few minutes later, defendant called back and

accused Torres of ratting on him. Defendant said that “if he ever saw [Torres] in [his] fucking life, that he was going to kill [her.]”

Later that same day, in cooperation with law enforcement, Torres visited defendant in jail. A tape recorder was hooked to the telephone, and Detective Alfredo Parra, Jr., was listening in on the conversation. Defendant admitted to Torres that he had killed Figueroa and that he did not regret doing so. Detective Parra heard defendant say in Spanish that he was at peace with what he had done and that if he saw Figueroa again face to face, he would do the same thing. Defendant also said that he had removed the aggravation from his life.

On February 13, 2002, a forensic specialist went to Figueroa’s home. What appeared to be blood spots were found throughout the home. Glass fragments were also found in the home behind the couch, underneath the foot of the coffee table, and in front of the love seat. The forensic specialist also found possible blood stains in the white GMC Jimmy, as well as possible blood stains on a scrub brush and pail that were in the back of the vehicle.

About a week later, defendant’s father informed Detective Parra that a large glass ashtray was missing from the apartment. The ashtray was kept on the coffee table and measured eight to ten inches in diameter.

On February 15, 2002, Dr. Steven J. Trenkle, a forensic pathologist, performed an autopsy on Figueroa. Dr. Trenkle observed that 60 to 70 percent of Figueroa’s body had been burned; that there were some remnants of clothing, which had a strong smell of a gasoline-like substance; that there was a melted plastic bag over her face; and that there

was swelling and hemorrhaging in the tissue around her eyes and nose. Dr. Trenkle opined that Figueroa suffered blunt force injuries as evidenced by hemorrhaging on her head, scalp, and face and that the hemorrhaging on Figueroa's head was caused by six to eight hits, such as hard punches or kicks. Dr. Trenkle also testified that lacerations on Figueroa's head were caused by at least one blow to her head, either from something hitting her body or her body hitting something else. Dr. Trenkle believed that Figueroa had been hit six to eight times with a "considerable amount of force." Dr. Trenkle also found that Figueroa had six broken ribs and blood in her lungs; extensive hemorrhaging in the muscles around the fractures; and damage to her thyroid cartilage, as well as hemorrhaging around it. Dr. Trenkle concluded Figueroa's cause of death to be strangulation.

II

DISCUSSION

At trial, defense counsel requested the trial court to instruct the jury with CALJIC No. 8.42, the voluntary manslaughter instruction as a lesser included offense to the murder charge. The trial court refused, finding no evidence of heat of passion or provocation to support "giving the lesser included." Defendant claims this was an error, requiring reversal. We disagree. Contrary to defendant's claim, the trial court properly found that there was insufficient evidence defendant acted upon sudden quarrel, provocation, or heat of passion.

"[T]he trial court must instruct on a lesser offense necessarily included in the charged offense if there is substantial evidence the defendant is guilty only of the lesser.

[Citations.]” (*People v. Birks* (1998) 19 Cal.4th 108, 118.) Substantial evidence is evidence sufficient to deserve consideration by the jury; that is, evidence that a reasonable jury could find persuasive. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1008.)

Murder may be reduced to voluntary manslaughter where the killing was done in the heat of passion, under provocation, or in unreasonable self-defense. (See *People v. Rios* (2000) 23 Cal.4th 450, 460-461.) Section 192, subdivision (a) provides that a killing “upon a sudden quarrel or heat of passion” is voluntary manslaughter. In support of his argument that a heat of passion instruction was required, defendant cites the testimony of Torres. Torres testified defendant told her that Figueroa and defendant did not get along; that Figueroa was strict with defendant and had certain house rules, such as he had a 7:00 p.m. curfew, he was not allowed to touch anything unless Figueroa was there, he was not allowed to turn on the television or stereo, and if he came home late he would be locked out of the house; and that Figueroa insulted defendant and his mother whenever she could, although she never heard Figueroa insult defendant or his mother. Torres also testified that about a year before the murder there was an incident where Figueroa yelled at defendant for taking a shower, being too loud, and sneaking into the house after 7:00 p.m. She further stated that Figueroa prevented defendant from establishing a relationship with his father. Defendant also relies on Torres’s statement that she noticed defendant had a scratch on his face, blood on his shirt, and tearing on his clothes to argue that a fight had ensued prior to the murder. Defendant further cites his father’s testimony, in which his father testified that Figueroa and defendant did not get

along and regarding the incident in which Figueroa called the police to report her car stolen by defendant. Notably absent from the record, however, is any evidence that Figueroa was harsh, strict, or violent toward defendant any time close to the time of her death.

“The heat of passion requirement for manslaughter has both an objective and a subjective component. [Citation.] The defendant must actually, subjectively, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are also viewed objectively. As we explained long ago in interpreting the same language of section 192, ‘this heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances,’ because ‘no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man.’ [Citation.]” (*People v. Steele* (2002) 27 Cal.4th 1230, 1252-1253.)

The evidence in this case failed to satisfy either the subjective or the objective component of the heat of passion requirement. With respect to the subjective component, the evidence cited by defendant showed, at most, that he may have become upset with Figueroa for being a strict stepmother and for allegedly talking disrespectfully about him and his mother. Becoming upset about how Figueroa disciplined him, however, is a far cry from acting in the heat of passion.

The passion that will reduce a killing from murder to manslaughter must be a “[v]iolent, intense, high-wrought or enthusiastic emotion” (*People v. Breverman*

(1998) 19 Cal.4th 142, 163.) Here, there was no substantial evidence that defendant acted out of such an emotion. No witness testified that defendant appeared angry or otherwise emotional when he killed Figueroa. Defendant's father, in fact, testified that on the night of the incident defendant appeared normal and calm.

The evidence also failed to satisfy the objective component of the heat of passion requirement. To satisfy that component, there must be conduct on the part of the victim "sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. [Citations.]" (*People v. Lee* (1999) 20 Cal.4th 47, 59.) And even where sufficiently provocative conduct occurs, "if sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return, the killing is not voluntary manslaughter" [Citation.]" (*People v. Breverman, supra*, 19 Cal.4th 142, 163.)

Viewed objectively, strict rules, the stolen car incident, the shower incident, and the victim allegedly speaking disrespectfully about defendant and his mother do not rise to the level of conduct that would cause an ordinary person to act rashly or without deliberation. Moreover, even if Figueroa's conduct did rise to that level, sufficient time had passed by the time of the killing for any passion to have subsided. The shower incident, where Figueroa yelled at defendant for taking a shower, sneaking in after 7:00 p.m., and being too loud occurred almost a year prior to the murder. And the stolen car incident, where Figueroa called the police after defendant took her car, occurred on February 1, 2002, 11 days before the murder.

People v. Fenenbock (1996) 46 Cal.App.4th 1688 is instructive. The defendant heard, secondhand, that the victim had molested a minor girl. Later the same day, he and others drove to a remote spot and stabbed the victim. The court stated: “The only inference to be drawn is that any passions that may have been aroused upon first hearing the reports of molestation had cooled so that the killing became an act of revenge or punishment.” (*Id.* at p. 1704.)

Even a brief lapse of time between the provocation and the killing is enough to preclude heat of passion. In *People v. Middleton* (1997) 52 Cal.App.4th 19, disapproved on another point in *People v. Gonzalez* (Aug. 21, 2003) 2003 WL 21982325, the victim pointed a gun at the defendant, and the defendant struck him. While the victim was on the ground, the defendant went to get his gun and then returned and shot the victim. The court held the lapse of time negated any use of provocation to reduce the killing to manslaughter. (*Middleton* at p. 34.)

Defendant points out that legally adequate provocation may occur over a period of time, citing *People v. Wharton* (1991) 53 Cal.3d 522 (*Wharton*) and *People v. Berry* (1976) 18 Cal.3d 509 (*Berry*). The proposition of law is correct as a general matter, but it does not apply to this case. *Wharton* and *Berry* and the decisions on which they relied involved extreme circumstances not fairly comparable to those involved here.

In *Wharton*, the defendant killed the woman with whom he lived. On the night of the killing, they had been drinking heavily and began to argue. She threw a book at him, and he hit her twice in the head. He then tried to kill himself and later lit a fire in the fireplace to keep the victim’s body “warm.” A defense psychiatrist concluded the

defendant was under the influence of extreme mental or emotional disturbance at the time of the killing, due to his dysfunctional relationship with the victim. His unusual behavior following the killing further indicated the defendant may have briefly lost contact with reality. (*Wharton, supra*, 53 Cal.3d at pp. 544-546.)

In *Berry*, the defendant was a 46-year-old man who killed his 20-year-old wife. Three days after they were married, the wife left the country by herself for more than a month. When she returned, she told the defendant she had fallen in love with another man and had enjoyed his sexual favors, that he was coming to claim her, and that she wanted a divorce. For the next two weeks, the wife alternately taunted the defendant with her involvement with the other man and at the same time sexually excited the defendant, indicating her desire to remain with him. A defense psychiatrist testified the wife was a depressed and suicidally inclined woman who had taunted the defendant in an unconscious desire to provoke him into killing her. As a result of this cumulative series of provocations, the defendant was in a state of uncontrollable rage, completely under the sway of passion. (*Berry, supra*, 18 Cal.3d at pp. 513-514.)

In *People v. Borchers* (1958) 50 Cal.2d 321, the defendant was a 45-year-old man who killed his 29-year-old fiancée. While they were engaged, the victim admitted sexual relations with another man. A private investigator informed the defendant that the other man had a police record as a pimp, and the victim was taking money from the defendant and giving it to the other man. The victim told the defendant she wished she were dead and tried to jump from a car as they were driving. She took a gun from the glove compartment, pointed it at the defendant and then at herself, and repeatedly asked him to

shoot her. (*Id.* at pp. 324-326.) The defendant eventually did so after the victim said, “Go ahead and shoot, what is the matter, are you chicken.” (*Id.* at p. 326.)

In *People v. Bridgehouse* (1956) 47 Cal.2d 406, disapproved on another point in *People v. Lasko* (2000) 23 Cal.4th 101, 110, the defendant killed a man who was having an affair with his wife. His wife told him of the affair but refused to stop seeing the other man. She said she would not hesitate to lie or use any other methods to fight the defendant’s divorce action and would kill him if he tried to take the children from her. One of the defendant’s charge accounts had been used to buy a gift for the other man, and he had found the other man’s clothing hanging in the closets of his home. The killing occurred when the defendant unexpectedly found the other man at his mother-in-law’s home when he went there to get some clothing for his child. (*Bridgehouse* at pp. 408-411.) The evidence showed the defendant “was mentally and emotionally exhausted and was white and shaking” when he killed the victim. (*Id.* at p. 414.)

The facts of this case are not remotely comparable to the circumstances of the above cases, all of which involved love relationships gone awry and defendants who were under extreme and protracted emotional distress. The evidence in this case showed, at most, that defendant may have become displeased with Figueroa’s strict rules and for allegedly disrespecting his mother and may have wanted to get revenge by getting rid of her to make his life “easier.” Indeed, defendant admitted to Torres that he did not regret killing Figueroa; that he was at peace with what he had done; that if he saw the victim again face to face, he would do the same thing; and that he had removed the aggravation

from his life. It is settled that a passion for revenge will not reduce murder to manslaughter. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1144.)

Moreover, under these circumstances, defendant's suggestion that the killing may have been prompted by Figueroa's stern discipline and her insults towards defendant and his mother are nothing more than speculation. "Speculation is an insufficient basis upon which to require the trial court to give an instruction on a lesser included offense." [Citation.] (*People v. Sakarias* (2000) 22 Cal.4th 596, 620.) As the trial court noted, speculation is not evidence, and there was no support for the instruction from the facts of this case. Torres admitted that she never met Figueroa or heard her insult defendant or his mother. Torres's testimony that Figueroa would insult defendant whenever she could was based on what defendant told her. Defendant's father was aware that Figueroa and defendant did not get along but testified that their problems were "not that bad." Furthermore, contrary to defendant's claim, the scratch on defendant's face, blood on his shirt, and his ripped pants were not factors indicating provocatory conduct. Rather, they were evidence of a struggle, possibly Figueroa fighting for her life, but not substantial evidence of Figueroa provoking defendant. Without any concrete evidence to suggest an imminent struggle or danger or some type of heat of passion that erupted when the killing occurred, the trial court was not required to give voluntary manslaughter instructions based on the hypothetical possibility that provocation, heat of passion, or unreasonable self-defense could have played some role in the killing.

Defendant has cited no case holding that the kind of facts involved here satisfy the criteria for a heat of passion instruction, and we are aware of none. We conclude the

court did not err in failing to instruct on voluntary manslaughter based on provocation and heat of passion.

III

DISPOSITION

The judgment is affirmed.

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RICHLI
J.

We concur:

HOLLENHORST
Acting P.J.

GAUT
J.